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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 209

YEE WON,

Appellant,

vs.

EDWARD WHITE, as Commissioner of
Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Ninth Circuit.

M. WALTON HENDRY,
JOHN L. McNAB,
JOSEPH P. FALLON,
Attorneys for Appellant.



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The opening statement in Respondent's Brief is substantially correct with the exception of the reference to the immigration records on page three thereof, to the effect that certain records were not made a part of the record before this Court. On the contrary, the said immigration records were made a part of the record by stipulation and are now

on file in this Court. An examination, therefore, can be had as to whether the demurrer to the petition was properly sustained by an examination of the original petition together with the immigration records afterwards made a part of it.

Assuming that the immigration officials can, in the face of positive evidence of wealth and mercantile status, hold a man to be a laborer on a qualified identification of the photograph of petitioner as a person seen driving a laundry wagon there is but a single question of law involved and that question, together with the facts upon which it is predicated, is best and most concisely stated by the Court below in its order above mentioned. The portion of that order pertaining to these issues is as follows:

"The record discloses here the fact that Yee Won is the husband of Chin Shee and the father of the minor children, Yee Tuk Oy and Yee Yuk Hing, who seek admission into this country as the wife and children of a domiciled merchant.

The record also shows that Yee Won is a man of means whose right to remain here is not apparently questioned. The immigration authorities found upon evidence that would seem to warrant the finding, that he has been engaged in driving a laundry wagon quite recently. This finding deprives him of the mercantile status to which he lays claim.

It is not absolutely certain, however, that, as he himself is entitled to remain, his wife and children may not be admitted as the wife and children of one rightfully in this country who is entitled to the companionship of the wife and care and comfort of the children.

The question has never to my knowledge been so decided, and as it is a matter of grave moment, I think if such rule be laid down it should be laid down by a higher tribunal. The wife and children have been admitted on bonds pending this hearing, and this presents a fair case through which to have the question suggested definitely determined."

It will thus be seen that the sole question is whether or not a Chinese person entitled to remain in this country by virtue of our treaty with China, although held by the immigration officials to have lost his status as a merchant, is entitled to have his wife and minor children admitted.

We respectfully submit that a denial of such a right is a violation of our treaty with China. By the treaty between China and the United States dated November 17, 1880, it is agreed that:

"Whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation,

or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse." Article I.

And:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Article II.

This treaty has been construed innumerable times both by the Supreme Court of the United States and by other Federal tribunals to permit a merchant to bring into this country his wife and children. The same reasoning by which this privilege (we may call it right) has been extended to the wife and children of a Chinese merchant is equally applicable to the wife and children of a Chinese laborer who is entitled under Article II of the treaty, to remain in the United States and to go and come of his own free will and accord.

The right to the comfort and companionship of one's family is a natural one and was recognized by several of the judges in the Federal Courts prior to the famous case of *United States v. Gue Lim*, 20 8. Ct. 415; 176 U. S. 459.

In *re Tung Yeong*, 19 Fed. 184, Judge Hoffman said:

"It was not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child and to send the latter back across the ocean to the country from which he came."

Judge Deady, in one of the earliest cases construing the treaty in conjunction with the Chinese Exclusion Acts, said, in the case of *In re Chung Toy Ho*, 42 Fed. 398:

"It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

The late Supreme Justice Field of the Supreme Court of the United States held in what is known as the case "of the Chinese wife", 21 Fed. 785, as follows:

"It is contended by the district attorney that the status of the petitioner is that of her husband, and therefore she must be regarded as a laborer, and, as such, required to furnish a

laborer's certificate to establish her right to enter the United States. This position might, in some instances, be tenable; but there are many callings of a man which the wife would not, from her relationship to him, be deemed to follow; such as that of a lawyer or physician, or of a merchant or manufacturer. We think the case of a wife falls under the sixth section of the act. She is to be regarded as a person other than a laborer, and, as such, required to present the certificate from her government there designated."

In a dissenting opinion by Judge Sawyer, he sets forth the two propositions, one favorable to the view of the wife, and the other in opposition to it. That in favor of the wife follows:

"The argument in favor of petitioner's husband's right to land his wife is that the restriction act purports to be 'An act to execute certain treaty stipulations relating to Chinese'—not to abrogate them; that all the provisions of the act scrupulously avoid everything that expressly conflicts with the treaty; that the treaty expressly provides that 'all Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations'; that among the 'rights and privileges' accorded to citizens of all other nations, are, to come of their own free will and accord, and to bring their wives and children with them; that the treaty, therefore, in clear, express and unmistakable terms, secures these same rights and privileges to returning Chinese laborers of bringing their wives and children with them, as rights belonging and pertaining

to the husband and father; that congress has not excluded their wives and children by name or in express terms; and that it is not to be presumed, from any general language used in the act, that congress intended to override and abrogate the rights thus specifically and expressly secured by the treaty, thereby to that extent repealing or abrogating the treaty."

It is to be remarked, after reading the above, that the construction sought for by Justice Field was that every Chinese person, whether coming to the United States for the first time, or whether returning to a previously acquired domicile therein, was required to present the certificate provided for in Section 6. The main part of the learned Justice's holding to which we advert is the fact that he expressly held that the wife of a lawfully domiciled laborer was entitled to admission. With respect to the requirement of the certificate it is to be remarked that the Supreme Court subsequently in the case of *Lau Ow Bew v. U. S.*, 144 U. S. 47, Justice Field dissenting, held that this requirement did not extend to a merchant who was returning to a previously acquired domicile in this country. That it manifestly applied only to those who were coming here in the first instance. The next step was the decision of the Supreme Court in the case of *United States v. Mrs. Gue Lim*, 176 U. S. 459, in which it was held that the wife and minor children of a domiciled merchant were not required to procure the certificate in question, as they came in by virtue of their husband's and

father's status. We are not advised that the question of the right of the wife or child of a lawfully domiciled laborer to land has ever been passed upon by the Supreme Court. In the recent case of *Chin Fong v. Backus*, 241 U. S. 1-5, *supra*, the Court would seem to recognize the equality of interests between laborers lawfully domiciled within the United States and others of the nonlaboring class, and in the still more recent case of *White v. Chin Fong*, *supra*, it will be noted that the right of a judicial hearing upon the question of legality of prior residence was not restricted to merchants, but would seem to be extended to all those returning to this country.

A careful examination of the treaty will show that the same rule must be followed in the case of Chinese laborers in the United States, as in the case of teachers, students or tourists. They are all classed together and the treaty provides that all "shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation". This would entitle all of the classes mentioned in the treaty to all of these rights, privileges, immunities and exemptions as long as the same rights, privileges, immunities and exemptions were enjoyed by the citizens and subjects of other nations.

These persons have a certain status and it has been held that that status continues with them as far as their right to remain in the country is concerned, notwithstanding that through choice or ne-

cessity they are forced to change their occupation. Such was the decision of the District Court in *United States v. Fong Hong*, 233 Fed. 168. In that case a Chinese merchant entered the country under a Section 6 certificate and subsequently became a laborer. It was held that this did not affect his right to remain in the United States. Had he subsequently to his laboring sought to bring his wife and children into the country, can it be seriously contended that they would not have been entitled to land? They would have been the family of a person lawfully entitled to remain in the United States; his domicile would have been their domicile, and his natural right to their company, their care and their custody would be none the less a fact by reason of his change of occupation.

The record here does not disclose whether the appellant was originally a merchant and changed his occupation prior to seeking entry for his wife and children, but the record does show, in the language of the Court below "that Yee Won is a man of means whose right to remain here is not apparently questioned".

The immigration record discloses that the petitioner is a man of substantial fortune, amassed in this country. As a matter of fact, it is contended, on evidence which petitioner's counsel does not regard as seriously conflicting, that the whole case rests on mistaken identity. Certain witnesses identified petitioner's photograph as that of a man seen driving a laundry wagon. On being confronted by

petitioner, at least one admitted the mistake and others qualified their identification. The treaty of 1880 accords him certain rights, privileges, immunities and exemptions and that treaty is the supreme law of the land. Those rights, privileges, immunities and exemptions cannot be abridged by reason of the means by which he seeks his livelihood while a resident in the United States.

Among those rights, privileges, immunities and exemptions are the rights to the company and companionship of his wife and the care and custody of his children, and by the common law his domicile is their domicile.

It is therefore respectfully submitted in the present case that the demurrer should be overruled, and the writ directed to issue.

Dated, San Francisco,

April 4, 1921.

Respectfully submitted,

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